No. 20-16932

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MI FAMILIA VOTA; ARIZONA COALITION FOR CHANGE; ULISES VENTURA,
Plaintiffs-Appellees.
v.
KATIE HOBBS, in her official capacity as Arizona Secretary of State,
Defendant-Appellee,
and
REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE
Intervenors-Defendants-Appellants,
and
STATE OF ARIZONA,
Proposed Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:20-cv-01903-SPL

STATE OF ARIZONA'S REPLY TO RESPONSE IN SUPPORT OF ITS MOTION FOR A STAY PENDING APPEAL

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TABLE OF CONTENTS

PAGE

Proposed Intervenor-Defendant-Appellant the State of Arizona (the "State") joins in the arguments raised by Intervenor-Appellants and incorporates them by reference. In addition, the State offers a few points in support of its motion for a stay pending appeal.

INTRODUCTION

Plaintiffs' opposition bizarrely leads with an argument that is categorically and demonstrably wrong. Specifically, Plaintiffs contend (as their lead, Roman I argument) that "there is no irreparable harm" here and discount the harms to the State entirely (in part by incorrectly asserting that the intervening party is the Attorney General and not the State). Opp. at 4-7. But the Supreme Court has *expressly* held otherwise, squarely providing that enjoining a "State from conducting [its] elections pursuant to a statute … *seriously and irreparably harm[s]*" the State. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (emphasis added). And although the State prominently cited *Abbott* on *page one* of its motion, Plaintiffs ignore it entirely. But what could they say?

In any event, the State suffers irreparable harm more generally any time one of its laws is enjoined. And the record provides clear evidence of specific harms as well.

Plaintiffs' attempt to distinguish this Court's recent—and ultimately controlling—decision in *Arizona Democratic Party v. Hobbs*, Nos. 20-16759, 20-16766, --F.3d--, 2020 WL 5903488 (9th Cir. October 6, 2020), is unavailing. *Both* cases involve a court extending by injunction a process that already existed: in *Arizona Democratic Party* curing non-signatures and here registering to vote in time to qualify for the

general election. That case cannot be distinguished and controls here.

More generally, the injunction issued patently violates *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Indeed, the injunction here—just like *Purcell*—was issued on October 5 of an election year. Nor was there any justification for the delay: coronavirus was a known potential issue at least as far back in *March*. There was no basis for delaying a coronavirus-based suit until *September 30*, leading to an injunction on October 5.

ARGUMENT

I. THE STATE WILL SUFFER IRREPARABLE HARM ABSENT A STAY

A. The State Is Suffering *Per Se* Irreparable Harm

As the State as explained previously on the first page of its motion for a stay, the State "suffers irreparable harm from the [injunction] since it prevents the State from enforcing its duly-enacted election laws." Mot. at 1. And the State specifically cited *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), which squarely held that enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature… would seriously and irreparably harm" the State. *Id.* That holding was specifically in the *election* context, and is thus indistinguishable. And while the State prominently cited *Abbott* (at 1), Plaintiffs offer no answer to it. *Abbott* controls here, which Plaintiffs' silence concedes.

Abbott's holding rests in part on the fact that the "Supreme Court has held that the design of election procedures is a legislative task." *DNC v. Bostelmann*, Nos. 20-

2835, 20-2844, --F.3d--, 2020 WL 5951359, *2 (7th Cir. Oct. 8, 2020). This remains true even during a pandemic: "[A] State legislature's decision either to keep or to make changes to election rules to address COVID–19 ordinarily should not be subject to second-guessing by an unelected federal judiciary[.]" *Andino v. Middleton*, No. 20A55, __ U.S. __, 2020 WL 5887393 (U.S. Oct. 5, 2020) (internal quotations omitted) (Kavanaugh, J., concurring).

But that is precisely the error that the district court committed. Under *Andino*—which notably had no noted dissent from the stay grant—the district court below had no more business second-guessing the State's registration deadline during a pandemic than the District of South Carolina had second-guessing South Carolina's retention of a witness requirement for mail-in balloting. Indeed, to the extent that the cases are distinguishable, the burdens that Arizona imposes on voting are *far less* than those involved in *Andino*—particularly as Arizona residents may register online.

The State's motion further quoted this Court's precedents, holding that "it is well-established that 'a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined,'" Mot. at 1 (quoting *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997)), and cited *Maryland v. King*, which held that "any time a State is enjoined by a court from effectuating its statutes it suffers a form of irreparable injury." 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (cleaned up).

Plaintiffs also do not address either *Wilson* or *King*, further conceding

irreparable harm here. Instead, Plaintiffs cite *Doe #1 v. Trump*, 957 F.3d 1050 (9th Cir. 2020) and *Al Otro Lado v. Wolf*, 952 F.3d 999 (9th Cir. 2020). Neither case involved enjoining an election-related statute, and thus could not trump the Supreme Court's controlling, and directly-on-point holding in *Abbott*. Indeed, both cases involved challenges to administration policies, not an injunction of a duly enacted statute. Neither thus displaces *Wilson*, which remains binding authority here.

Ultimately, if there is any way to reconcile Plaintiffs' irreparable-harm argument—*i.e.*, their *lead* argument—with *Abbott*, *Wilson*, and *King*, Plaintiffs have refused to provide it. Indeed, if they had any answer to any of those cases, they might have cited even a single one of them. They failed to do so.

B. The Record Contains Significant Evidence Of Additional Harms

As Arizona's Secretary of State explained below, "[h]aving a voter registration deadline fall on the 29th day prior to a general election is imminently reasonable so that elections officials may compile the lists of eligible voters to administer an honest and orderly election." 2:20-cv-01903-SPL, Dkt. 16 at 10. "Further, extending the registration deadline by three weeks would cause a host of other problems for elections officials." *Id.* For example, if a voter chooses to be placed on Arizona's permanent early voting list close in time to the October 23 deadline to request a mail-in ballot, election officials will have administrative difficulties honoring that request, causing a voter who thought she could vote by mail to be unable to do so. *Id.* at 11. The prior deadline was also necessary to ensure voters have lived in the state for 29

days before voting (a state voter eligibility requirement). 2:20-cv-01903-SPL, Dkt. 26 at 15-16. So the district court's injunction will cause irreparable harm to voters, who may be given a false sense of their ability to vote by mail, and the State, which may have individuals participate in its elections who are ineligible to do so.

The Court need not take the State's word for the ongoing harm that it is suffering. The Governor of Arizona, Arizona's legislative leaders, and ten of the fifteen county recorders in Arizona (including from counties with significant native voting populations) have explained to this Court the multiple ongoing issues created by the district court's injunction. *See* Dkt. 38-2. "The County Recorders are the elected officials who are responsible for the actual administration of Arizona's elections, including the processing of voter-registration forms" and are therefore well-situated to describe the actual impact that the district court's injunction is having on election administration.[1] *Id.* at 2. The Governor, legislative leaders, and county recorders explain that the voter registration deadline is needed to allow county recorders to perform all of the administrative functions they are required to perform leading up to an election. *Id.* at 20. The district court's injunction is making the performance of those functions impossible:

> These duties include registration verification, *see* Ariz. Rev. Stat. § 16-166; inclusion on the permanent early voting list, *see* Ariz. Rev. Stat. § 16-544; and management of early-ballot requests, *see* Ariz. Rev. Stat. § 16-

[1] The county recorders were not permitted to express their views about the relief requested because Plaintiffs refused to name them as defendants.

> 542. In addition, § 16-120 allows election officials to focus their limited resources on processing early ballots, given that early voting begins just two days after the statutory voter-registration deadline. *See* Ariz. Rev. Stat. § 16-542(C). Most importantly, under Ariz. Rev. Stat. § 16-168, the County Recorders must prepare a list of all qualified electors in each precinct in the county to be used as the official precinct registers at the polls by October 23, 2020. This will be impossible, as the district court's new voter registration deadline is October 23, 2020 at 5 p.m.

Id. at 20; *see also* 2:20-cv-01903-SPL, Dkt. 18-3 ¶¶ 12-14 (Arizona State Elections Director explaining the administrative difficulties and voter confusion likely from Appellees' requested relief).

There is nothing speculative about this irreparable harm. And every day that passes under the district court's new election regime will result in additional voter confusion and administrative chaos. This is not harm that can be repaired after the fact. The only way to stop it is to stay the district court's injunction.

II. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S RECENT *ADP V. HOBBS* DECISION

As the State explained previously (at 2-3), resolution of the stay motions here is controlled by *Arizona Democratic Party*. Plaintiffs offer only a terse response, contending (at 16) that "[h]ere, by contrast, no change to Arizona's elections procedures was ordered and no 'new procedure' of any kind had to be created or implemented; the State was merely directed to continue to accept voter registrations for a little longer than it usually does."

That is specious. In *Arizona Democratic Party*—as here—there were existing procedures in place that Plaintiffs sought to extend. In that case, Arizona permitted

mail-in voters to "cure" missing signatures until election day, and Plaintiffs sought to extend to five business days after the election. *Arizona Democratic Party*, 2020 WL 5903488 at *1. In other words, "no 'new procedure … had to be created'" and Arizona election officials would simply continue that procedure "for a little longer than it usually does." Opp. at 16. So too here: Arizona has existing procedures for registering to vote for the upcoming general election, and Plaintiffs seek to extend those procedures "for a little longer." Plaintiffs' attempted distinction is belied by what was actually at issue in *Arizona Democratic Party*.

Moreover, to the extent that the cases are distinguishable *at all*, two salient facts make a stay *more* appropriate here. *First*, the injunction was issued *far* closer to the election: on October 5, rather than September 10, making the *Purcell* issues that that the *Arizona Democratic Party* panel held were significant, *Arizona Democratic Party*, 2020 WL 5903488 at *2, considerably more powerful here. *Second*, the extension sought (and, so far, obtained) by Plaintiffs is considerably longer: *three full weeks*, as opposed to five business days.

Because Plaintiffs offer no distinction of *Arizona Democratic Party* that can withstand even the gentlest scrutiny, this Court should grant the State's requested stay.

III. THE DISTRICT COURT'S INJUNCTION SQUARELY VIOLATES *PURCELL*

Plaintiffs offer no persuasive response why *Purcell* does not bar relief here. Instead, they offer two arguments, both meritless. *First*, Plaintiffs cite—without any

apparent shame and without noting *any* subsequent history—this Court's order in *Feldman v. Arizona Sec'y of State's Office*, 843 F.3d 366, 368 (9th Cir. Nov. 4, 2016). Opp. at 15. But the Supreme Court notably stayed that injunction a mere *one day later*, as the State's specifically noted in its motion (at 3-4), and Plaintiffs entirely ignore.

In any event, while the quoted part of *Feldman* is correct—that *Purcell* is not "a *per se* prohibition against enjoining voting laws on the eve of an election"—the non-categorical nature of the *Purcell* prohibition offers little solace to Plaintiffs. The Supreme Court's nearly unbroken string of granting stays of election-related injunctions—with all of those injunctions being issued *earlier* in this election cycle—makes clear that *Purcell* doctrine has enormous force in this context (as this Court's decision *this week* in *Arizona Democratic Party* makes clear). *See The New Georgia Project v. Raffensperger*, No. 20-13360-D, __ F.3d __, 2020 WL 5877588, *8-*9 (11th Cir. October 2, 2020) (noting Supreme Court has granted six out of seven election-related stays this election cycle pre-*Andino*). *Purcell* is not categorical, but it has presumptive force here that Plaintiffs cannot possibly overcome.

Moreover, the delay in filing suit here is about as severe and unjustified as they come. This suit was filed a mere 34 days before the election, as opposed to the *six months* before the election in *Purcell*. 549 U.S. at 3. And coronavirus's impacts were obvious at least as far back as *March*. Plaintiffs' delay in bringing suit until September 30 lacks any sustainable justification. If any injunction cries out for invalidation under *Purcell*, it is this one.

Second, Plaintiffs' attempt to distinguish (at 16-17) *Arizona Democratic Party v. Hobbs*—where this Court held that *Purcell* strongly weighed in favor of a stay in *Arizona Democratic Party*, *Arizona Democratic Party*, 2020 WL 5903488 at *2. But, as explained above, Plaintiffs' attempted distinction of that case falls flat. *See supra* at 6-7.

Moreover, the Seventh Circuit recently issued a stay pending appeal of a highly similar injunction based on *Purcell*—an injunction that, as here, extended the deadline for registering to vote based on coronavirus. *Bostelmann*, 2020 WL 5951359, *1-2. And in *Bostelmann* (1) the injunction was issued earlier in the election cycle on September 21, rather than the October 5 here, *id.* at 1, (2) the extension of the registration deadline was much more modest: a single week instead of three weeks, *id.*, and (3) the Seventh Circuit explained the impropriety of seeking coronavirus-based relief so late in the election cycle: "the pandemic has had consequences (and appropriate governmental responses) that change with time, but the fundamental proposition that social distancing is necessary *has not changed since March*," *id.* at 2 (emphasis added). Thus the Seventh Circuit concluded that "[b]y waiting until September, however, the district court acted too close to the election." *Id.* at 2.

The same result should obtain here for an injunction issued even later in the election cycle. This Court would have to create a square and unwarranted circuit split with the Seventh Circuit to deny relief.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant a stay pending appeal. Such a stay should be limited to those voters that register after the effective date of the stay.

Respectfully submitted this 10th day of October, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2020, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

s/ Drew C. Ensign
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